

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75613; File No. SR-NASDAQ-2015-059)

August 5, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, to List and Trade Shares of the Reaves Utilities ETF of ETFis Series Trust I

I. Introduction

On June 2, 2015, The NASDAQ Stock Market LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Reaves Utilities ETF (“Fund”) of ETFis Series Trust I (“Trust”) under Nasdaq Rule 5735. On June 12, 2015, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission published notice of the proposed rule change, as modified by Amendment No. 1, in the Federal Register on June 22, 2015.³ On June 17, 2015, the Exchange filed Amendment No. 2 to the proposed rule change.⁴ The Commission received no comments on the proposal, as modified by Amendment No. 1. This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 75178 (June 16, 2015), 80 FR 35682 (“Notice”).

⁴ In Amendment No. 2, the Exchange clarified the term “cash equivalents” in the Other Investments section means only money market instruments, short duration repurchase agreements, and short duration commercial paper. Amendment No. 2 is not subject to notice and comment because it is a technical amendment that does not materially alter the substance of the proposed rule change or raise any novel regulatory issues.

II. The Exchange's Description of the Proposal⁵

General

The Fund will be an actively-managed exchange-traded fund ("ETF"). The Shares will be offered by the Trust, which was established as a Delaware statutory trust on September 20, 2012. The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N-1A ("Registration Statement") with the Commission.⁶ The Fund will be a series of the Trust. Etfis Capital LLC will be the investment adviser ("Adviser") to the Fund, and W.H. Reaves & Co., Inc. (d/b/a Reaves Asset Management) will be the investment sub-adviser ("Sub-Adviser") to the Fund.⁷ ETF Distributors LLC will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon

⁵ The Commission notes that additional information regarding the Trust, the Fund, and the Shares, including investment strategies, risks, net asset value ("NAV") calculation, creation and redemption procedures, fees, Fund holdings disclosure policies, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. Terms not defined herein are defined in the Notice. See Notice and Registration Statement, supra note 3 and infra note 6, respectively.

⁶ See Registration Statement on Form N-1A for the Trust filed on January 30, 2015 (File Nos. 333-187668 and 811-22819) ("Registration Statement").

⁷ The Adviser is not registered as a broker-dealer; however the Adviser is affiliated with a broker-dealer. The Sub-Adviser is registered as a broker-dealer. The Adviser has implemented a fire wall with respect to its broker-dealer affiliate, and the Sub-Adviser has also implemented a firewall, regarding access to information concerning the composition and/or changes to the portfolio. In addition, personnel of both the Adviser and the Sub-Adviser who make decisions on the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. In the event (a) the Adviser registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, if applicable, regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. See Notice, supra note 3, 80 FR at 35683.

(“BNY Mellon”) will act as the administrator, accounting agent, custodian, and transfer agent to the Fund.

Principal Investments

The Fund’s investment objective will be to seek to provide total return through a combination of capital appreciation and income. Under normal market conditions, the Fund will invest not less than 80% of its total assets in exchange-listed equity securities of companies in the Utility Sector (“Utility Sector Companies”). The Fund considers a company to be a “Utility Sector Company” if the company is a utility or if at least 50% of the company’s assets or customers are committed to (or at least 50% of the company’s revenues, gross income or profits are derived from) the provision of products, services, or equipment for the generation or distribution of electricity, gas, or water.

Other Investments

To seek its investment objective, the Fund may hold cash and invest in U.S. exchange-traded options overlying securities and securities indexes and the following cash equivalents: money market instruments; short-duration, high-quality repurchase agreements;⁸ and short duration commercial paper.⁹ The Fund also may make short sales.

III. Discussion and Commission’s Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act¹⁰ and the rules and regulations thereunder

⁸ See id. at 35682, n.3.

⁹ See Amendment No. 2, supra note 4.

¹⁰ 15 U.S.C. 78f.

applicable to a national securities exchange.¹¹ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹² which requires, among other things, that the Exchange’s rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the initial and continued listing criteria in Nasdaq Rule 5735 for the Shares to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,¹³ which sets forth Congress’ finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares and any underlying exchange-traded products other than options will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares. Quotation and last-sale information for options is available via the Options Price Reporting Authority (“OPRA”). In addition, the Intraday Indicative Value,¹⁴ as defined in Nasdaq Rule 5735(c)(3), available on the NASDAQ OMX Information LLC proprietary index data service, will be widely disseminated by one or more major market data vendors at least every 15 seconds during the

¹¹ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

¹³ 15 U.S.C. 78k-1(a)(1)(C)(iii).

¹⁴ The Intraday Indicative Value will be calculated using estimated intraday values of the components of the Fund’s Disclosed Portfolio. For the definition of “Disclosed Portfolio”, see infra note 17 and accompanying text.

Regular Market Session.¹⁵ On each business day, before commencement of trading in Shares in the Regular Market Session¹⁶ on the Exchange, the Fund will disclose on its website the identities and quantities of the portfolio of securities and other assets (the “Disclosed Portfolio” as defined in Nasdaq Rule 5735(c)(2)) held by the Fund that will form the basis for the Fund’s calculation of NAV at the end of the business day.¹⁷ BNY Mellon, through the National Securities Clearing Corporation, will make available on each business day, prior to the opening of business of the Exchange (currently 9:30 a.m., E.T.), the list of the names and the quantity of each Deposit Security to be included in the current Fund Deposit (based on information at the end of the previous business day). The NAV of the Fund will be determined as of the close of trading (normally 4:00 p.m., E.T.) on each day the New York Stock Exchange is open for

¹⁵ Currently, the NASDAQ OMX Global Index Data Service (“GIDS”) is the NASDAQ OMX global index data feed service. The Exchange represents that GIDS offers real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs and that GIDS provides investment professionals with the daily information needed to track or trade NASDAQ OMX indexes, listed ETFs, or third-party partner indexes and ETFs.

¹⁶ See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m., E.T.; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m., E.T.; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m., E.T.).

¹⁷ The Fund’s disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions intraday. On a daily basis, the Fund will disclose on the Fund’s website the following information regarding each portfolio holding, as applicable to the type of holding: ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding); the identity of the security or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund’s portfolio.

business.¹⁸ Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Price information regarding the equity securities, options, money market instruments and money market funds held by the Fund will be available through the U.S. exchanges trading such assets, in the case of exchange-traded securities, as well as automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. Intra-day price information for all assets held by the Fund will also be available through subscription services, such as Bloomberg, Markit and Thomson Reuters, which can be accessed by Authorized Participants and other investors. The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Trading in the Shares will be halted under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pause provisions under Nasdaq Rules 4120(a)(11) and (12). Trading in the Shares may be halted because of

¹⁸ NAV will be calculated for the Fund by taking the market price of the Fund's total assets, including interest or dividends accrued but not yet collected, less all liabilities, and dividing this amount by the total number of Shares outstanding.

market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable,¹⁹ and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which trading in the Shares may be halted. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. Further, the Commission notes that the Reporting Authority²⁰ that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.²¹ In addition, the Exchange states that the Adviser is not registered as a broker-dealer; however the Adviser is affiliated with a broker-dealer, and the Sub-Adviser is registered as a broker-dealer. The Adviser has implemented a fire wall with respect to its broker-dealer affiliate, and the Sub-Adviser has also implemented a firewall regarding access to information concerning the composition and/or changes to the portfolio, and personnel who make decisions on the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio.²² The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities

¹⁹ These reasons may include: (1) the extent to which trading is not occurring in the securities and/or the other assets constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares.

²⁰ Nasdaq Rule 5730(c)(4) defines "Reporting Authority."

²¹ See Nasdaq Rule 5735(d)(2)(B)(ii).

²² See supra note 7. The Exchange states that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940.

laws.²³ The Exchange further represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. Moreover, prior to the commencement of trading, the Exchange states that it will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares.

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including the following:

- (1) The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund with other markets and other entities that are members of the Intermarket Surveillance Group ("ISG"),²⁴ and FINRA may obtain trading information regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund from such markets and other entities. In

²³ The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA's performance under this regulatory services agreement.

²⁴ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

addition, the Exchange may obtain information regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund from markets and other entities that are members of ISG, or with which the Exchange has in place a comprehensive surveillance sharing agreement.

- (4) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares in creation units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.
- (5) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.²⁵
- (6) The Fund's net assets that are invested in exchange-traded equities, including ETPs and common stock, will be invested in instruments that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing

²⁵ See 17 CFR 240.10A-3.

agreement with the Exchange.

- (7) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities and other illiquid assets (calculated at the time of investment). The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities or other illiquid assets.
- (8) Under normal market conditions, the Fund will invest not less than 80% of its total assets in exchange-listed equity securities of companies in the utility sector.
- (9) Under normal market conditions, no more than 20% of the value of the Fund's net assets will be invested in any combination of cash and cash equivalents, which include only money market instruments, short duration repurchase agreements, and short duration commercial paper, and U.S. exchange-traded options on securities and securities indexes.
- (10) The Fund's investments will be consistent with its investment objective. The Fund does not presently intend to engage in any form of borrowing for investment purposes, except in the case of short sales and will not be operated as a "leveraged ETF," i.e., it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.
- (11) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice, and the Exchange's description of the Fund.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act²⁶ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁷ that the proposed rule change (SR-NASDAQ-2015-059), as modified by Amendment Nos. 1 and 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Robert W. Errett
Deputy Secretary

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78s(b)(2).

²⁸ 17 CFR 200.30-3(a)(12).